MUSLIM FAMILY LAW REFORM IN PAKISTAN

In response to continued pressures for a more Islamic form of government, the former Prime Minister of Pakistan, Zulfikar Ali Bhutto has stated that the scope of Islamic law will be broadened and strengthened in Pakistan. Therefore, a study of Islamic law in Pakistan seems especially timely. This paper will focus on the history of Muslim family law reform in Pakistan, traditionally the heart of the Shari'ah and the major area of Islamic law which remains in force throughout the Muslim world. Emphasis will be given to both substantive legal changes and the methodologies utilized to effect them.

1. ANGLO-MUHAMMADAN LAW

The practice of traditional Muslim law in India-Pakistan in the early stages of British rule was unimpaired by foreign intervention. Although many changes came about in other areas, the judicial attitude of the British was characterized by non-interference with the prevailing legal system. Thus, traditional Hanafi law, which had been authoritative under the Mughal dynasty, remained in force. Gradually, however, mere British presence changed to an assertion of British power, especially at the end of the eighteenth century when the British East India Company became more involved in the political and legal life of the country in order to protect its own interests. Initial interference came in 1772 with Warren Hastings' reorganization of the court system by which British law was applied in the Presidencies while Muslims and Hindus continued to be governed by their respective religious laws in all matters. As *Regulation II of 1772* said:

> . . . in all suits regarding inheritance, succession, marriage and caste and other usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to the Gentoos (Hindus), shall be invariably adhered to.[1]

This situation remained until the latter half of the nineteenth century when the application of Muslim law was narrowed even further by the enactment in 1862 of the *Indian Penal Code* and the *Code of Criminal Procedure*. Moreover, portions of the civil code were also codified. As a result of such measures, Islamic law in the Indian sub-continent came to be restricted to the domain of family law.

Even more important than earlier pieces of legislation for an under-

[1] A.A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd ed., (New York: Oxford University Press, 1965), p. 47.

standing of legal changes in India-Pakistan is the functioning of the courts themselves. Since the judges were either British or Muslims trained in British law, English legal principles and concepts were often introduced when there was a lack of knowledge of traditional Arabic legal texts or when justice and equity seemed to necessitate a departure from traditional law. In addition, the Indian courts, following the British practice, operated on a case-law system of, legally binding precedents. The changes in substantive law, resulting from the use of such precedents as well as the adoption of certain English juristic methods, led to a legal practice so influenced by the British that it has come to be called "Anglo-Mohammedan Law."

2. PRE-PARTITION MUSLIM FAMILY LAW REFORM

The first important changes in Muslim family law in the Indian subcontinent occurred with the passage of the *Indian Evidence Act of 1872*, which substantially reflected English law in its two areas of reform, establishing paternity and putative widowhood. These reforms, only implemented in the Muslim Middle East 60 years later, were very progressive. Regarding paternity, *Section 112* established a presumption of legitimacy for a child born during a valid marriage or within 280 days of its dissolution unless non-access is proved.[2] Thus following British law, the new law decreed that a child born within days after the marriage is presumed to be the legitimate child and heir of the husband. This rule departed from the six-months maximum norm of the classical legal tradition.

The second change in family law introduced by this Act concerned the minimum time necessary for the court to declare putative widowhood. Considering the hardship of the wife who could not re-marry until she was officially considered a widow, the caution of the Hanafi law, which set a waiting period of 90 years from the husband's date of birth, was deemed excessive and unjust. Therefore, the Act decreed that after a seven-years absence, if attempts to find the husband have failed, the court may issue a decree of death and, in effect, declare putative widowhood.

In the areas of marriage and divorce, additional reforms in family law did not occur until 1929 when the *Child Marriage Restraint Act* sought to limit child marriage, a social ill quite common in the Indian subcontinent.[3] Thus, minimum marital ages of 16 years for girls and 18 years for boys were established. The Act provided penalties for any male over 21 years who marries a child and for the parent or guardian who promotes, permits,

[2]However, children born after 280 days from the date of the divorce may be declared legitimate by the court on the basis of medical evidence or other substantiated evidence.

[3]*Section 2A, Child Marriage Restraint Act, 1929.*

or fails to prevent such a child marriage.[4] Most importantly, the courts were empowered to issue an injunction against a child marriage on the basis of a substantiated complaint.[5]

However, despite the prohibition and penalties, child marriages still remained valid, although they were considered to be illicit. Thus, while an attempt was made to curb a social ill, the lawmakers as in most other Muslim countries, avoided nullifying long established regulation. The discouragement of an abuse rather than its outlaw was preferred.

A decade passed before additional family law reform was implemented. This occurred in the Indian subcontinent in 1939 with *The Dissolution of Muslim Marriages Act*. Ostensibly the Act intended to:

> . . . consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women . . . and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.[6]

Actually, however, its purpose was to improve the status of women and to grant them some judicial relief through establishing grounds for divorce, most of which were not recognized by the official Hanafi opinion followed in the courts of the sub-continent. Thus, in citing the reasons for the legislation, the lawmakers asserted:

> There is no provision in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. Legislation, then, became necessary in order to relieve the sufferings of countless Muslim women.[7]

To the two grounds recognized by the Hanafi school, viz. the husband's impotence and exercise of the option of puberty, were added a husband's desertion, failure to maintain, failure to perform marital obligations, severe or chronic (physical or mental) defects, cruelty or maltreatment towards his wife. However, the 1939 legislation, in a renewed attempt to limit the occurrence of child marriages, broadened one of the traditional grounds for divorce, the option of puberty. Originally the option of puberty in Hanafi law governed all situations in which a minor was given in marriage by someone other than the father or grandfather. Under the new legislation a female minor given in marriage by her father or grandfather before

[4] *Sections 4 and 6*: this was amended by *The Muslim Family Law Ordinance, 1961, Sections 12–13* which reduced the age of the male from 21 to 18 years of age.

[5] *Section 12*, (1)

[6] Preamble to *The Dissolution of Muslim Marriages Act, 1939*.

[7] *Gazette of India*, Part V, 1938, p. 36.

age 15[8] was granted the right to repudiate that marriage any time before reaching 18 years of age, provided the marriage was not consummated.[9]

Regarding maintenance as a new ground for divorce, *Section 2 (ii)* decreed that non-support for a period of two years is sufficient ground for a divorce suit. However, a grace period was provided during which time the husband could satisfy the Court that he would perform his conjugal duties and, if this occurred, the decree would be set aside.[10] Maintenance was not recognized as a cumulative debt and thus a husband who indicated a willingness to pay present maintenance avoided the divorce as well as payment of the past due maintenance.

Chronic defects (physical and mental) were also recognized as grounds for divorce. A woman was entitled to sue for divorce if her husband has been insane for two years or is suffering from leprosy or a virulent venereal disease.[11]

Finally, a major reform occurred with the inclusion of cruelty (*darar*) as a ground for divorce. Cruelty, as defined in the law, amounted to physical maltreatment or mental anguish. The six subclauses which accompany this regulation provide great breadth. A wife may obtain a divorce if her husband:

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill treatment, or
(b) associates with women of evil repute or leads an infamous life, or
(c) attempts to force her to lead an immoral life, or
(d) disposes of her property or prevents her exercising her legal rights over it, or
(e) obstructs her in the observance of her religious profession or practice, or
(f) has more wives than one and does not treat her with equality in accordance with the injunctions of the *Quran*.[12]

This last subclause (f) is the one instance in which the reform law followed Maliki rules more closely. However, although the reformers claimed to be substituting Maliki principles where Hanafi principles were found wanting, they completely omitted the rather detailed Maliki proce-

[8] This was changed to 16 years of age by *Muslim Family Laws Ordinance of 1961.*

[9] *Section 2.7* of *The Dissolution of Muslim Marriages Act, 1939.*

[10] *Section 2, (ix, b)*

[11] *Section 2. (vi)* Other chronic or dangerous diseases have been included in judicial interpretations.

[12] *Section 2. (viii)*

dures for using arbitrators as had been done by similar reforms in the Middle East.[13]

The Dissolution of Muslim Marriages Act adopted judicial decree (*faskh*, recission) rather than Maliki law's judicial repudiation (*talaq*) which was used by Middle Eastern reformers. This difference has practical consequences, since the *talaq* is a revocable repudiation which only becomes final at the end of the *iddah* period, whereas *faskh* becomes final upon its issuance by the Court.

Finally, a clear departure from traditional teaching occurs in the fourth section of the law which decreed that a Muslim woman's renunciation of Islam or conversion to a faith other than Islam shall not dissolve her marriage. This particular reform reflects the lot of women prior to this divorce legislation. Lacking sufficient means for relief from intolerable marital situations, Muslim women were renouncing Islam or nominally claiming conversion to another faith in order to qualify under traditional Hanafi law for a dissolution of their marriage.

3. POST-PARTITION FAMILY LAW REFORMS

Despite the reforms rendered by the *Dissolution of Muslim Marriages Act*, inequity still remained, for there were many marital situations in which the wife could not fulfil all the requirements of the specific grounds recognized in the Act of 1939. These women were entrapped by marriages in which the total incompatibility of the partners made their union an unjust hardship and yet they lack the right, a right that men had always enjoyed, to free themselves.

Traditional Hanafi law did not recognize incompatibility of temperaments as a legitimate ground for a wife to seek a *khul* divorce. This position was reaffirmed in 1952 by the Pakistan Supreme Court in the case of *Sayeeda Khanam* v. *Muhammad Sami*.[14] In a Full Bench decision the Court observed:

> . . . if the wives were allowed to dissolve their marriage without consent of their husbands by merely giving up their dowers, paid or promised to be paid, the institution of marriage would be meaningless as there would be no stability attached to it.[15]

However, by 1959 this position was changed in *Balquis Fatima* v. *Najm-ullkram Qureshi*, by the High Court of Lahore. The Court asserted its right to grant a *khul* divorce where serious incompatibility made a harmonious marriage impossible.

[13] *Cf. below for a more detailed discussion of this issue.*

[14] *Pakistan Legal Decision*, 1952 (W.P.) Lahore 113, (F.B.), Hereafter cited as *P.L.D.*

[15] *P.L.D.* 1952 (W.P.) Lahore 113, (F.B.)

According to Hanafi law, a *khul* divorce was extra judicial, based on mutual agreement and, most importantly, dependent upon the husband's consent for its validity. However, basing themselves on the *Quran* II: 229:

> If ye (judges) do indeed fear that they would be unable to keep the limits ordained by God, there is no blame on either of them if she give something for her freedom,

the Court's interpretation was that the *hakam* (originally the arbitrator whose office was taken over by the *qadi*, or judge) has the power to separate the spouses and so dissolve their marriage. Thus the Court, through its interpretation of Islamic sources, departed from traditional Hanafi law and allowed judicial dissolution of a marriage by a judge upon the evidence that:

> . . . the limits of God will not be observed, that is, in their relations to one another, the spouses will not obey God, that a harmonious married state as envisaged by Islam, will not be possible.[16]

The requirements set for a wife seeking such a divorce are: (1) showing that incompatibility prevented a harmonious marriage and (2) returning her dower.[17]

That the Court sought to remedy the social injustice suffered by women can be seen in the Judges' observation that:

> The marriage has to be terminated because it is not a reasonably possible view that a marriage must continue even though the husband misbehaves, or is unable to perform his obligation or for no fault of the wife it would be cruel to continue it.[18]

This position of the High Court was given the highest approbation in 1967 when in the case of *Khurshid Bibi* v. *Mohamed Amin*,[18A] the Supreme Court, the highest judicial authority in Pakistan, declared that Khushid Bibi was entitled to a divorce upon returning her dower to her husband. Thus, while the right of the man to repudiate his wife has remained unfettered, the granting of a unilateral *khul* divorce to a woman in case of incompatibility represents significant headway in achieving a balance of human rights.

[16] *P.L.D.* 1959 (W.P.) Lahore 566 (paragraph 42).

[17] The Maliki school had allowed a dissolution on similar grounds by arbitrators appointed to examine and resolve a case of serious marital discord either through reconciliation, or where this proved impossible, dissolution of the marriage. Cf. Fyzee, p. 168. However, the Pakistan High Court in no way followed or prescribed the detailed procedural steps prescribed by the Malikis.

[18] *P.L.D.* 1959 (W.P.) Lahore 566.

Reforms in Muslim family law that occurred in the Indian subcontinent prior to 1947 continued in effect in both India and the new Muslim nation of Pakistan after the Partition, and legal reform in the new state also continued.

Muslim Family Laws Ordinance, 1961

Despite the massive difficulties facing the new nation of Pakistan as it sought to establish itself, it quickly revealed its concern for its Islamic character. Only eight years after its founding on August 4, 1955, a seven-member commission was established to review Muslim family law to determine whether changes were necessary "in order to give women their proper place in society according to the fundamentals of Islam."[19]

The commission was composed of three laymen, three women and one religious scholar (to represent the *'ulama'*). Their work resulted in the *Report of the Commission on Marriage and Family Laws of June, 1956.* The Report represented the recommendations of the six laymen majority. However, shortly thereafter in August 1956, Maulana Ihtisham-al-Haq, the religious scholar and a traditionalist, published a vigorous dissenting report taking issue with virtually every major recommendation of his colleagues on the commission. There then ensued an extended debate between modernists and traditionalists.

In March of 1961 many of the recommendations of the Commission on Marriage and Family Laws were embodied in *The Muslim Family Laws Ordinance VIII of 1961*, which introduced reforms in marriage, polygamy, divorce, maintenance, and succession. However, the effect of conservative opposition to many reforms can also be seen in certain provisions or qualifications that weakened the effect of the reforms.

(a) *Marriage Registration*

To avoid the difficulties of false claims resulting from oral contracts, especially in an increasingly mobile society, Pakistan introduced the requirement of written registration of marriages and created the office of *Nikab* Registrar (Marriage Registrar) to grant marriage licenses and oversee the registration of marriages.[20] Failure to report marriages to the Registrar became punishable by fine and/or imprisonment.

However, these restrictions were considerably weakened since failure to register a marriage did not effect the validity of the marriage and the maximum sentence for neglecting such registration was only three months.

[19] Cited in Freeland Abbott, *Islam and Pakistan*, (Ithaca, New York: Cornell University Press, 1968), p. 198.

[20] *Section 5*, Nos. 1–2.

The effectiveness of this law was further hampered since judicial relief was not denied to unregistered marriages in Pakistan. Thus suits involving marriage, divorce, paternity and inheritance in unregistered marriages were admissable.

(b) *Polygamy*

Reform legislation was also introduced to limit polygamy. The law required the creation of the Arbitration Council, a new institution to handle polygamous marriage, divorce and maintenance. Regarding polygamy, a married man who wished to contract another marriage is now required to obtain written permission from the Council. Each applicant is required to state the reasons for the proposed marriage and the attitudes of his wife or wives towards giving their consent to the marriage.[21] The Chairman will then organize the Arbitration Council by asking the parties involved to nominate their representatives. Upon examination of the application and if convinced that the proposed marriage is "necessary and just," permission is granted.[22] In determining what is necessary and just, the *West Pakistan Rules Under the Muslim Family Laws Ordinance, 1961* suggests that the Council consider "Sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of a decree for restitution of conjugal rights or insanity on the part of the existing wife."[23] Decisions of the Council are subject to appeal.[24]

A husband who fails to comply with the above regulations is penalized in the following ways: immediate payment of the entire dower to his existing wife or wives; his wives have the right to immediate dissolution of their marriage;[25] imprisonment for up to one year and/or a fine up to 5,000 rupees.[26] Furthermore, marriages contracted without the Council's permission are denied official registration and thus all cases which might arise from such a marriage are denied judicial relief.[27] However, despite these sanctions, all such marriages are still valid.

[21] *Section 6.2*

[22] *Section 6.3*

[23] *Section 14.*

[24] *Section 6.4*

[25] Section 13 of this *Ordinance* is entitled "Amendment of the Dissolution of Muslim Marriages Act, 1939, (VIII, 1939)" and directs that the following amendment be added to Section II regarding grounds for divorce, "(iia) that the husband has taken an additional wife in contravention of the provisions of the *Muslim Family Laws Ordinance, 1961.*"

[26] *Section 6.5 a and b*

[27] *Section 6.1*

(c) *Divorce*

As previously noted, the *Dissolution of Muslim Marriages Act of 1939*, although supposedly following Maliki law, had in several important instances ignored Maliki doctrine concerning the grounds for divorce. The Indian law had failed to include the detailed procedures for arbitration in cases where the wife sues for divorce on the basis of cruelty or maltreatment. This is an especially noteworthy criticism since the Maliki doctrine is based on a *Qur'anic* injunction:

> If ye fear a breach between them twain Appoint (two) arbiters, one from his family, and the other from hers. (*Qur'an* IV: 35)

However, the *Ordinance of 1961* remedied this deficiency by employing the Arbitration Council for all cases of divorce.

To discourage hasty exercise of the husband's right of repudiation (*talaq*), this reform legislation required written notice to the Chairman as well as to the wife.[29] A 90-day waiting period is required during which the Council will seek to reconcile the couple.[30] The divorce then will not take effect until the 90-day period has elapsed or, if the wife is pregnant, until the completion of pregnancy.[31]

Although failure to observe the above procedures is punishable by fine and/or imprisonment the penalties are relatively light (up to one year or a fine of up to 5,000 rupees.)[32] This, coupled with the fact that failure to comply with the regulations regarding the Arbitration Council has no effect on the validity of the divorce, has diminished its effectiveness.

Paralleling an earlier Egyptian reform, the new legislation also decreed that all divorces are revocable and thus remarriage without an intervening marriage is possible, (unless this is the third such divorce.) This reform returned to the *Qur'anic* law requiring three divorces, separated by a waiting period, for an irrevocable divorce. As a result, it eliminated the abuse of *talaq al-bid ab* which had caused much social injustice by circumventing the *Qur'anic* waiting period (*iddah*). As a consequence, it also eliminated the need for both parties who had been divorced by *talaq al-bid'ah* to arrange for an intervening marriage before their remarriage was possible.[33]

[28] *Section 8*

[29] *Section 7.1*

[30] *Section 7.4*

[31] *Section 7.3* and *5*.

[32] *Section 7.2*

[33] *Section 7.6*

In the *Ordinance of 1961* the Arbitration Council was employed in yet another area – a wife's claim of maintenance. The procedure involving the Council is similar to that used for polygamy and divorce cases. Prior to the passage of this law, several remedies were available to a wife who attempts to recover maintenance due her: application under 488 of the *Criminal Procedure Code*, a suit for recovery of maintenance, or, if the two years had passed without maintenance, a suit for dissolution of the marriage. Now the Council had broad powers to review claims involving non-support or inadequate support and to award or refuse maintenance. Council decisions are subject to review at the district level by the district supervisor whose decision is final.

(d) *Succession*

From the juristic viewpoint, the most noteworthy reform in the Ordinance of 1961 concerned the law of succession. The specific problem necessitating this legislation involved the plight of orphaned grandchildren. Under Islamic law and the principle of intestate succession that the nearer in degree excludes the more remote, orphaned grandchildren had no legal claim to share in the estate of their deceased grandfather and thus obtain the portion which would normally be due their predeceased parent if he were alive. Section 4 modified the traditional law of inheritance by introducing the principle of full representation for orphaned grandchildren of the *praepositus*, i.e. they are to receive "a share equivalent to the share which such son or daughter as the case may be, would have received if alive."[34]

Whereas most Muslim countries had avoided direct intervention in the law of succession and instead taken the indirect route of broadening the law of testementary bequests so as to include *Qur'anic* heirs, Pakistani reformers chose to meet this problem head on by legislating a reform in the law of succession itself despite the lack of any traditional authority (legal school or recognized individual legal scholar).

(e) *Religious Endowment (Waqf)*

In the area of reform, the history of *waqf* in India-Pakistan proves interesting both from the viewpoint of jurisprudence and the reform of substantive law.

As mentioned earlier, the law of the subcontinent constitutes its own species – Anglo-Muhammedan Law. The normal procedure of the court in family law cases called for reference to authoritative texts of the Hanafi

[34] *Section 4, Muslim Family Law Ordinance, 1961.*

school in rendering decisions. However, under British influence, the judges in practice also utilized the legal principle of equity. Thus, in cases where the bench decided that application of the letter of the law compromised equity, the judges might not follow it. The exercise of this judicial independence led to a major legal crisis at the end of the nineteenth century in the case of *Abul Fata Mahomed Ishak* v. *Russomoy Dhur Chowdhry*.[34a] The case concerned two brothers who created a family *waqf* whose income was to pass on to their children and then to their descendents until the family was extinct. Then, the usufruct of the *waqf* was to be used for charitable purposes. The Privy Council held that the *waqf* was invalid but this was later reversed by legislation.

4. PROPOSALS IN PAKISTAN

In Pakistan, the All-Pakistan Women's Association and other women's organizations have continued to agitate for further reforms in family law. The following were proposed as amendments to the *Family Laws Ordinance of 1961*:

1. That in accordance with the *Qur'anic* sayings notice of the intention of divorce should be communicated to the Authorities before the actual divorce notice, so that there is a better chance of avoiding divorce. Also the wife, should stay in her husband's home during her *'iddat'* so that by remaining together there may be some chance of their reconciliation.
2. The *Family Laws Ordinance* is silent on custody. The law should provide that whilst deciding about the custody of the children of broken homes, the court should keep in view not only the welfare of the children but also the wishes of such children.
3. That women who are divorced by their husbands without any reasonable cause or without their being at fault should be allowed reasonable maintenance by the husband as enjoyed (*sic.*) by the *Holy Qur'an*. 'For divorced women maintenance should be provided on a reasonable scale. This is a duty on the righteous.' (*Qur'an*: 2:24)
4. Separate courts should be established (in which only family dispute cases should be tried) for family and marital disputes in all districts and cases be heard and decided by a special judge within a prescribed period of three months.[35]

However, only the fourth proposal was acted upon. *The West Pakistan Family Courts Act, 1964* established separate Family Courts ". . . for the expeditious settlement and disposal of disputes relating to marriage and family affairs and for matters connected therewith."[36]

[34a](1894) 22 I.A. 76.

[35]A.P.W.A. - *Recommendation of Family Laws Ordinance*, Lahore: n-d.

[36]"Preamble", *The West Pakistan Family Courts Act*, 1964, (Act XXV of 1964).

During the period since 1964, the major area for family law reform legislation has been that of dowry the *West Pakistan Dowry (Prohibition of Display) Act* of 1967 and the *Dowry and Bridal Gifts (Restriction) Act* of 1976.

Pakistan is a country in which many citizens live a marginal economic existence. Yet, social customs and the dowry demands of some males in a society where their number far exceeds that of women create situations in which parents often go far beyond their economic means to marry a daughter. Thus, lavish weddings and substantial dowry demands cause many families to assume onerous debts.[37]

The beginning of attempt to remedy this social problem occurred in 1967 with the passage of the *West Pakistan Dowry (Prohibition of Display) Act* which constituted a rather limited attempt to discourage two abuses. First, it forbade the display or exhibit of dowry or any bridal gifts under penalty of imprisonment for up to one year or a fine not to exceed 5000 rupees (approximately $500).[38] Second, seeking to protect a woman's right to her dowry and bridal gifts, the law affirmed her status as "absolute owner."[39] Furthermore, it stipulated that should the dowry or bridal gifts be given to someone, other than the bride, they shall be transferred to her within one year from the date of marriage in cases where they were received before marriage[40] and within one year of the date of their receipt in cases where the dowry and/or gifts were received at the time of or after the marriage.[41] Additionally, should the woman die before receiving her property, such property passes to her heirs and thus they are entitled to claim it from whoever is holding it.[42] The law prescribed penalties of up to one year imprisonment or a fine not to exceed 5000 rupees (approximately US$500) for failure to comply with the above regulations.[43]

Women's organizations and other social reform-minded individuals continued to call for more comprehensive and detailed dowry legislation. Finally, the government of Prime Minister Zulfikar Ali Bhutto, under the

[37] For a discussion of this problem and the extent to which this social evil prompted recent reform legislation cf. "Dowry Bill receives inside support in National Assembly" in *Morning News*, May 5, 1976.

[38] Section 3.

[39] Section 4.1

[40] Section 4.2a.

[41] Section 4.2b.

[42] Section 4.4.

[43] Section 4.3.

supervision of its minister of religious affairs, Maulana Kausar Niazi, gave its support. In July, 1976 the *Dowry and Bridal Gifts (Restriction) Act* was enacted. The law set restrictions in three major areas: (1) dowry and bridal gifts (2) presents[44] (3) marriage feasts.

The new law repealed the *West Pakistan Dowry Act of* 1967. Like its predecessor, the *Dowry Act* of 1976 affirms unequivocably that ownership of the dowry, bridal gifts and presents are vested in the bride.[45] However, unlike the law of 1967, the *Dowry Act* of 1976 established a specific limit on the total value of the dowry and bridal gifts permissible, 5000 rupees (approximately US$505).[46] It also stipulated that dowry, bridal gifts or presents may not be given before or after six months of the Nikah (marriage) unless Rukhsati, (the final ceremony, after Nikah, when the bride departs her parental home to live with her bridegroom), occurs some time after Nikah (marriage). In this case, the six month limit is computed from the day of Rukhsati.

The new legislation also set restrictions on "presents" (i.e. other than the dowry and bridal gifts) by (a) stipulating that no individual may give a bridal present whose value exceeds 100 rupees (approximately $10) (b) prohibiting high and middle level government officials or civil servants from accepting bridal gifts for their marriage or that of a son or daughter except from their relations (Khandan).[47]

The marriage feast itself was the subject of the final restriction. Money spent on such celebrations is not to exceed 2500 rupees (approximately $252). As a check on violations of this as well as all other restrictions, parents of the bride and groom must furnish lists of the dowry, bridal gifts, presents and expenditures to the registrar of marriages who in turn shall forward it to the Deputy Commissioner.[48] The latter is the only official empowered to determine a violation and issue a complaint. All such complaints are triable only by a Family Court.[49] In addition, at the

[44] "Bridal gifts" refers to any property given before or after the marriage by the bridegroom or his parents in connection with the marriage whereas "presents" refers to any property other than the dowry and bridal gifts given either spouse in connection with the marriage.

[45] Section 5.

[46] Section 3.1.

[47] Section 4. This restriction does not bind those lower levels officials (below level 17) on the National Pay Scale who exercise neither executive nor judicial authority.

[48] Section 8. This requirement is the direct opposite of that in the *Dowry Act* of 1967 due to obviously different rationale.

[49] Section 9.2.

time of Rukhsati, the dowry and all bridal gifts and presents must be displayed for all to see.[50]

The prescribed penalties for violation of the law are: (1) imprisonment for up to one year or a fine of 10,000 rupees (approximately $1,000) or both;[51] (2) confiscation of all dowry and gifts in excess of the legal limit by the federal government in order that such items may be used for the marriage of poor girls.[52]

5. LEGAL METHODOLOGY OF PAKISTAN'S REFORMS: A CRITICAL ANALYSIS

A study of modern Muslim law reform in Pakistan reveals three specific legal mechanisms employed: *siyasah shar'iyyah*, *takhayyur*, and judicial decision through the exercise of *ijtihad*.

Since Pakistani reform in family law was accomplished through government legislation, the *siyasah shar'iyyah* power of the ruler or government provided Islamic or religious justification. This doctrine of Islamic public law grants the political authority the prerogative power, whenever he sees fit, to take administrative steps in the public interest in order to insure a society ruled according to the *Shari'ah*. Thus, full judicial power rested in the sovereign's hands so that he could determine the organs of legal administration as well as the extent of their jurisdiction.[53] Such discretionary powers were granted the ruler in order to insure that the spirit of *Shari'ah* rule be present in the state in areas that were either not covered at all or not covered sufficiently by the letter of the law. This then became the umbrella under which family law reforms might be justified.

A widespread application of *siyasah shar'iyyah* involved the government's selection of one legal doctrine from among the variant opinions of the four Sunni law schools and its prescribing that it also be applied by the courts. The practice of *takhayyur* (selection, preference) was the basis for this activity. Originally, *takhayyur* referred to the right of a Muslim to select and follow the teaching of a school of law other than his own with regard to a particular transaction. Reformers took the principle and applied it to legislative reform. A major example of this was the reform legislation of 1939 which established grounds for divorce based on Maliki

[50] Section 7.

[51] If both parents are responsible for violation of the law, only the father will be prosecuted. On the other hand, if only a female violates the law, she will be subject to a fine but not imprisonment. Section 9.1.

[52] *Ibid.*

[53] N.J. Coulson, *A History of Islamic Law*, (Edinburgh: University of Edinburgh Press, 1964), pp. 132–133.

opinion. The *siyasah* power of the political authority was then invoked to pass legislation which required the courts to apply the "preferred" or "selected" Maliki opinions.

However, Pakistani reformers' use of *takhayyur* was quite different from traditional usage, as can be seen in the *Dissolution of Muslim Marriage Act of 1939* since it lacked systematic consistency. The legislation of 1939 differed from Maliki opinion regarding scope of desertion, the length of maintenance period, cumulative nature of maintenance, and the lack of detailed procedures regarding arbitration in maltreatment cases.[54] Furthermore, from a traditional juristic point of view, the law of 1939 arbitrarily veered from Maliki opinion by prescribing divorce by judicial decree *(faskh)* rather than judicial repudiation *(talaq)*. This variance is significant not only because of its departure from traditional ways but because of change in the effective date of a divorce.[55] Since a divorce by *faskh* results in an immediate final dissolution whereas *talaq* does not take effect until the expiration of the wife's *iddah* (waiting period).

Recent legislative action in Pakistan has demonstrated a new attitude toward direct substantive change based on social need. Thus the inclusion in the law of inheritance by the *Muslim Family Laws Ordinance of 1961* of the rule that orphaned grandchildren are entitled to their father's share of a deceased grandfather's estate provides a clear example of reform based upon social need. The Pakistan legislators directly reformed the law of inheritance despite a lack of any basis in traditional law.[56] This action was rationalized on the grounds of social desirability and a lack of any prohibition in the primary sources of Islamic law *(Qur'an* and *Sunnah)*.[57]

A means of reform peculiar to Anglo-Muhammadan law occurred through the operation of the courts. In the traditional Islamic legal system, the courts were merely to apply the law of authoritative legal manuals, not to create or expand it.[58] However, several factors influenced a departure from classical law in the subcontinent: the judiciary was not as learned in legal texts as *qadis* of the Middle East for whom Arabic, the language of legal manuals, was a mother tongue. Most importantly, the judges were,

[54] See above p. 5.

[55] *Ibid.*

[56] See above pp. 16–17.

[57] A similar defence can be found in K. Faruki, *Islamic Studies*, IV, No. 3, (1965) 264 ff.

[58] The court had taken this position repeatedly. Cf., for example, *Aga Mohamed v. Koolson Beebe* (1897), and *Baker Ali Khan v. Anjuman Ara Begum* (1903) 30 *India Appeals*, 94.

from 1772 on, British. It was only in the late nineteenth and twentieth centuries that any Muslims were appointed to the Bench. In any event, all judges were trained in the British legal system and so British legal principles, especially those of justice and equity, were employed. Thus, while traditional law was respected, where it was judged insufficient to issue a "just" decision, the courts supplemented the law (departed from strict adherence to Islamic law.) Two primary instances of such judicial legal supplementation concern the inclusion of stipulations in marriage contracts and the rejection of family *waqf*.

With the exception of the Hanbali school, the Sunni schools of law do not admit the inclusion of stipulations or conditions concerning the rights of the marital partners.[59] However, the courts in the Indian subcontinent, although committed to follow Hanafi law, have quietly allowed such agreements in Muslim marriage contracts, and this action was not the result of adoption of Hanbali opinion.

The second example of judicial interference with traditional law concerned the law of religious endownment (*waqf*). In 1894 the Privy Council upheld a high court decision which was contrary to Hanafi law of family *waqf*. However, the Court's clear departure from traditional law in rejecting the validity of family *waqf* was later reversed by *waqf* legislation.

The courts of Pakistan have, within the last decade, taken an even bolder position regarding their powers. As mentioned above, although the principles of justice and equity had influenced court decisions, the function and duty of the court had always been recognized in theory as the application of Hanafi law as found in classical legal manuals. However, a clear departure from this position occurred in 1964 in a decision rendered by the High Court of Lahore in *Khurshid Jan* v. *Fazal Dad*.[59a] The question posed by the Court was "Can courts differ from the views of *imams* and other jurisconsults of Muslim law (i.e., the authoritative legal texts) on grounds of public policy, justice, equity and good conscience."

After an exhaustive study, the court responded that "if there is no clear rule of decision in *Qur'anic* and traditional texts . . . a court may resort to private reasoning, and, in that, will undoubtedly be guided by the rules of justice, equity, and good conscience . . . views of the earlier jurists and *imams* are entitled to the utmost respect and cannot be lightly disturbed; but the right to differ from them must not be denied to the present-day courts."[60]

The result of these landmark decisions is that the Courts of Pakistan no

[59] *Sayeeda Khanum* v. *Muhammad Sami* (1950) *P.L.D.* 113 cf. Fyzee, p. 119, and especially Sr. D. F. Mulla, *Principles of Muhammedan Law*, (Bombay: 1968) p. 293, footnote 1 for list of judicial decisions (precedents).

[59a] P.L.D. 1964 Lah. 458.

[60] N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, (Chicago:

longer view themselves as restricted to following *(taqlid)* the authoritative opinions of the past. Instead, where justice and equity demand, the Court may exercise *ijtihad* (resort to private reasoning) based on the following criteria: (a) that the decision meets a social need and (b) that the regulation is not prohibited by the *Qur'an* and *Sunnah*. However, the *ijtihad* of the Courts differs from the *ijtihad* of the past as well as that of many modernists who would base their *ijtihad* not only on social need but also more directly on *Qur'anic* values. Such an approach insures a more demonstrable Islamic basis and character for reforms and thus forges a link between contemporary legal reforms and the Islamic legal tradition.

While the reforms in Muslim family law introduced through legislation and judicial decision in Pakistan might have been needed, their lack of a systematic Islamic rationale creates serious problems. First, it raises questions as to the Islamic character of the laws and the relationship of the reforms to the body of traditional law. Second, following from this unresolved theoretical and methodological question, the apparent discontinuity of many reforms with traditional *fiqh* subjects them under heavy fire at times from traditionalist leaders and their followers the masses of the population who tend to be more conservative in outlook. Thus, for example, besides the strong opposition to the recommendations of the Commission on Marriage and Family Law of 1955 which delayed legislation until 1961, passage of the *Family Laws Ordinance* was followed by continued widespread discontent and debate. Consequently, in July 1963, the West Pakistan Provincial Assembly passed a resolution recommending the repeal of the Ordinance. With support from the A.P.W.A. and other women's organizations, much of the press, the President of Pakistan and his Law Minister, the bill to repeal the law was defeated in the National Assembly after 20 hours of debate on November 26, 1963.

In conclusion, Muslim family law in Pakistan has been subjected to extensive, substantive changes ostensibly to meet the needs of a changing society. However, if laws are to be effective, it is crucial that they come to be accepted and respected not only by the elites of a society but by the vast majority of its population. An approach which is more self-

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University of Chicago Press, 1969), pp. 106–107; The Court's power to exercise *ijtihad* was again underscored in *Zohra Begum* v. *Latif Ahmed* P.L.D. 1965 Lah. 695 in which the court departed from rules governing custody of a minor. The High Court of Lahore reversed the decision of a lower court and instead allowed a mother continued custody of her children beyond the ages at which they would usually be turned over to their father. This decision was justified in terms of the best interests of the child. (Coulson, *Ibid.*, pp. 111–112.)

consciously Islamic (i.e. cognizant of Islamic legal history) and which seeks to utilize this past more positively could both yield substantive results while, perhaps, accelerating their greater acceptance and adherence.[61]

*John L. Esposito**

[61] For a more complete discussion of the methodological problems of modern Muslim family law reform and an attempt to demonstrate the ability of the Islamic legal tradition to provide a methodology for contemporary reforms, see my article "Muslim Family Law Reform: Towards an Islamic Methodology" in *Islamic Studies*, Vol. XV (Spring, 1976), pp. 19–51.

*Associate Professor
Chairperson, College of
the Holy Cross, Worcestor,
Massachusetts.

CASE NOTES

SULAIMAN BIN KADIR AND BAIL IN OFFENCES PUNISHABLE WITH DEATH OR IMPRISONMENT FOR LIFE

SULAIMAN B. KADIR v P.P.[1]

The decision of Mr. Justice Harun in the 1976 case of *Sulaiman Bin Kadir* has further helped to entrench what is often considered to be one of the most controversial and illogical rules in Malaysian Criminal Procedure, namely, that a subordinate court has no power to grant bail if the accused is *charged* with an offence punishable with death or imprisonment for life. That rule was formulated some twenty-five years ago by Spenser Wilkinson J. in the Penang case of *R.* v. *Ooi Ah Kow*.[2]

Sulaiman Bin Kadir was arrested in August 1975 and charged with the offence of rape under section 376 of the Penal Code. His trial was fixed on a date in February 1976. In November 1975, after having been in custody for almost two and a half months, the accused applied to the Special Sessions Court in Kuala Lumpur for bail. This application was refused by the learned President under section 388(i) of the Malaysian Criminal Procedure Code[3] which reads as follows:—

> When any person accused of any non-bailable offence is arrested or detained without a warrant by a police officer or appears or is brought before a court, he may be released on bail by the officer in charge of the police district or by such court, but he shall not be so released if there appear *reasonable grounds for believing that he has been guilty* of an offence punishable with death or imprisonment for life[4]: Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

[1] [1976] 2 M.L.J. 37.

[2] [1952] M.L.J. 95

[3] F.M.S. Cap. 6 as amended and extended to the States of Malacca, Penang, Sabah and Sarawak by the Criminal Procedure Code (Amendment & Extension) Act, No. A 324 of 1976.

[4] The phrase "punishable with death or imprisonment for life" should be read disjunctively as if it reads "punishable with death or punishable with imprisonment for life": *R.* v. *Ooi Ah Kow*, [1952] M.L.J. 95; *Chinnakarappan* v. *P.P.*, [1962] M.L.J. 234; *Shanmugam* v. *P.P.*, [1971] 1 M.L.J. 283.